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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Goldshield Group, plc

Serial No. 75/543,708

Oliver E. Todd, Jr. of MacMillan, Sobanski & Todd, LLC for
Goldshield Group, plc.

Alicia Collins, Trademark Examining Attorney, Law Office
115 (Tomas Vlcek, Managing Attorney).

Before Walters, Chapman and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

Goldshield Group, plc (applicant) filed an application
to register the mark CENTURAL (in typed form) on the
Principal Register for goods ultimately identified as
"vitamin and mineral supplements and protein preparations
and substances for use as dietary supplements" in
International Class 5.¹

¹ Serial No. 75/543,708 filed on August 27, 1998. The
application contains an allegation of a bona fide intention to
use the mark in commerce.

The Examining Attorney has finally refused to register applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of the registration of the mark CENTER-AL (in typed form) for "allergenic extract used for injection and hyposensitization therapy in the field of allergy" in International Class 5.²

After the examining attorney made the refusal final, this appeal followed. Both applicant and the Examining Attorney filed briefs. An oral hearing was not requested.

We reverse.

The examining attorney maintains that the marks CENTURAL and CENTER-AL are nearly identical and the goods are highly similar. Specifically, the examining attorney determined that the goods "are offered by common sources, have similar uses, and are sold through the same channels." Brief at 7.

Applicant, on the other hand, argues that "cent" is widely utilized for various goods in the pharmaceutical field and that when the marks are compared in their entirety, the marks create different commercial impressions.³ Applicant, while agreeing that the parties'

² Registration No. 956,825 issued April 10, 1973. Section 8 and 15 affidavits have been accepted and acknowledged, respectively, and the registration has been renewed.

³ The examining attorney has objected to the list of registrations that applicant included in its appeal brief. While

respective goods are both "in the pharmaceutical field" (Brief at 5), maintains that registrant's goods are purchased by sophisticated and discriminating purchasers who would not be confused.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

normally it is not proper to include a list of registrations in an appeal brief, we note that this list is virtually identical to a list that applicant included in its response dated October 12, 1999, to the examining attorney's first Office action. At that time, it was arguing that a different cited registration, which was subsequently withdrawn, was not confusingly similar. Not only did the examining attorney not object to the list of registrations at that time, in the next Office action, the examining attorney cited one of the registrations applicant identified (the current 2(d) cite, Reg. No. 956,825) as a bar to registration. The list in applicant's appeal brief is the same as the list in the earlier response with the exception that the cited registration is no longer included. We, therefore, overrule the examining attorney's objection to this evidence, and it is accepted for whatever probative value it may have.

The first question we address is whether applicant's and registrant's marks, when compared in their entireties, are similar in sound, appearance, or meaning such that they create similar overall commercial impressions. In this case, the marks are similar, but not identical. CENTURAL and CENTER-AL are similar in appearance and pronunciation. While applicant argues that "the only similarity between the marks is the prefix 'CENT,'" (brief at 3), we do not agree. The marks are likely to be pronounced very similarly, and perhaps identically. However, while the marks also have a very similar appearance, it is possible that their meanings will not be identical inasmuch as "centur" appears to refer to "century" while "center" connotes "the middle."

Next, we look at the other relevant du Pont factors concerning the nature of applicant's and registrant's goods, their channels of trade, and prospective purchasers. Both applicant and the examining attorney agree that the goods are both pharmaceuticals, however, there is no per se rule that all pharmaceutical products are related.

It is clear that there is a per se difference between the goods of the respective parties as to their inherent characteristics, and, of course, as to uses. We regard both as being medicinal in character, but the product of appellants, in its essential substance, differs from the product of appellee in its essential substance, and difference in use is obvious. The fact

that both are medicinal in character and have a therapeutic effect upon users, of necessity makes carefulness in selection imperative on the part of prudent purchasers.

Ciba Pharmaceutical Products v. Abbott Laboratories, 121 F.2d 551, 50 USPQ 139, 140 (CCPA 1941) (medicinal wafers containing dicalcium phosphate and sedatives).

Here, registrant's goods are injectable medical products, which is a significant difference between the goods. "As to the goods, applicant's product is stated in the application to be a narcotic, and the statement that it is for intra-muscular use indicates that it is to be injected. Opposer's product is a vitamin E preparation, which is quite different." Wyeth Incorporated v. Injectables Research Corp., 100 USPQ 445, 446 (Exam. in Chief 1954).

The examining attorney has submitted evidence to show that vitamin preparations are used to treat allergies and that vitamins and allergy medicines are marketed under the same trademarks. Of course, we must determine the question of likelihood of confusion based on the identifications of goods in the application and the registration. See Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the

basis of the respective descriptions of goods"). See also Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"); In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997)(quotation marks omitted) ("Indeed, the second DuPont factor expressly mandates consideration of the similarity or dissimilarity of the services as described in an application or registration").

Here, we note that registrant's goods are narrowly defined as an "allergenic extract used for injection for hyposensitization therapy in the field of allergy." While the examining attorney has submitted numerous registrations to show that allergy medicine in general and vitamins come from the same source, many of these registrations specifically indicate that the allergy medicines are over-the-counter, non-prescription, and/or homeopathic allergy medicines. See Registration Nos. 2,284,912; 2,305,495;

2,295,341; 2,302,778; 2,225,067; 2,223,243; 2,108,559; 2,272,150; 2,303,522; and 2,254,250. This evidence is much less persuasive in demonstrating that registrant's extracts designed for injection as part of an allergy therapy are related to applicant's vitamins, minerals, and protein supplements.

The mere fact that both applicant's and registrant's goods may be sold in the same retail establishments does not by itself establish that the goods are related. In re Mars, Inc., 741 F.2d 395, 222 USPQ 938 (Fed. Cir. 1984) (Federal Circuit held that there was no likelihood of confusion between the same mark CANYON for candy bars and fresh citrus fruit). Registrant's goods would not be available to the general public without a prescription and even if they were both available in the same stores, the goods would not be likely to be encountered by the same purchasers at the same time. In addition to doctors who prescribe an injectable extract, purchasers of vitamins are likely to be careful purchasers. Miles Laboratories v. Naturally Vitamin Supplements, 1 USPQ2d 1445, 1451 (TTAB 1986) ("We agree with applicant that purchasers of vitamins are likely to exercise special care in making their product selection") (citation omitted).

While the examining attorney's evidence indicates that certain drugs are administered by self-injection, the evidence also indicates that these medications are obtained only by a doctor's prescription.

There are two versions of self-injectable epinephrine; both require a doctor's prescription.
New York Times, August 22, 2000, p. 8F.

[Dr. Mavis] Kelsey prescribed self-injected shots, and the headaches disappeared.
Houston Chronicle, July 6, 1999, p. 1.

[T]he second sting triggered a near-fatal allergic reaction that prompted his doctor to prescribe him a self-injection device containing epinephrine.
Washington Times, July 4, 1999, p. C8.

The limited identifications of goods are important in this case. We admit that this could easily be a different case if registrant's goods were not so narrowly described in the identification of goods. However, registrant's extracts for injections would be prescribed by a doctor as part of hyposensitization therapy for treating allergies. These physicians would be expected to exercise care in prescribing medications. While applicant's vitamins, minerals, and protein preparations would be available to the general public, apparently, the public would not be able to obtain an injectable allergy therapy without a doctor's prescription. Unlike other prescription drugs

that may be eventually be available without a prescription, this is not as likely with an injectable drug.

We also note that the marks, while similar, are not identical. While it is possible that a doctor may believe that the source of vitamins is related to the source of an injectable extract used in allergy therapy, the test is whether there is a likelihood of confusion. On the other hand, even if registrant's goods are designed for self-injection after being prescribed by doctor, we find it unlikely that a person who received a prescription for a self-injection allergy therapy would believe that vitamins sold under a very similar, but different, mark come from the same source or are sponsored by the source of the allergy medicine. Inasmuch as we hold that there is no likelihood of confusion when applicant's and registrant's marks are used on the respective goods, the examining attorney's refusal to register is reversed.

Decision: The refusal to register is reversed.